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Whiteside & Associates

Transportation & Marketing Consultants

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January 10, 2001

Office of the Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001

Attn: Ex Parte No. 582 Sub No. 1: Major Rail Consolidation Procedures

Dear Mr. Secretary:

Pursuant to the Notice of Proposed Rule Making on October 3, 2000 in the above-described proceeding, please find enclosed the original and twenty-five copies of the Rebuttal Statement of Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission referred to as the **Wheat, Barley and Grains Commissions due January 11, 2001**.

Also please find enclosed an IBM compatible floppy diskette electronic copy of the enclosed statement.

Please receipt duplicate copy and return in the self-addressed stamped envelope for our records.

Respectfully submitted,

Terry C. Whiteside
Registered Practitioner representing
Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission

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201 238

ORIGINAL

BEFORE THE SURFACE TRANSPORTATION BOARD

REBUTTAL STATEMENT
of
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
OREGON GRAINS COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION

STB Ex Parte No. 582 (Sub-1)
Major Rail Consolidation Procedures
January 11, 2001

The above listed parties, referred to as the Wheat, Barley & Grains Commissions, herewith submit their Rebuttal Statement in the Notice of Proposed Rule Making in the above-styled proceeding issued by STB on October 3, 2000.

BACKGROUND

The participants in this proceeding have persevered through a complete cycle of point/counterpoint. The Wheat, Barley & Grains Commissions continue to believe pro-competitive changes are needed to address the problems of rail consolidations and the market-dominance created by past merger policy procedures. This country will be faced, within months, with merger applications leading to the creation of a two-railroad system.

ENHANCED COMPETITION

The railroads have, in this proceeding, taken the general view that the public interest component of this proceeding does not require enhanced competition[1], it is beyond the Board's statutory authority[2] and are opposed to any form of it. The central idea of the STB's proposal was that it is time to explore a "paradigm shift" in favor of enhancing, rather than simply preserving competition, 49C.F.R. § 1180.1. Although we would prefer a more clearly defined idea of the intentions suggested by the Board in its proposed rulemaking, we do believe this is intended to be one of the centerpieces of the Board's proposed criteria for judging all future mergers. Nonetheless, the railroads have resorted to renaming 'enhanced competition' calling it "reregulation[3]", or "heavy handed regulation[4]", or "mandated competitive enhancements..lead to industry-wide reregulation[5]", or "proposals for specific forced-access and other "enhanced competition" requirements represents efforts to … re-regulated the industry[6]", or "STB's

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[1] Reply Comments of NS, dated December 18, 2000, at 19
[2] Reply Comments of NS, dated December 18, 2000, at 20
[3] Reply Comments of BNSF, dated December 18, 2000, at 16
[4] Reply Comments of BNSF, dated December 18, 2000, at 17
[5] Reply Comments of BNSF, dated December 18, 2000, at 19
[6] Reply Comments of NS, dated December 18, 2000, at 20

proposal ...to offer measures to "enhance" rail-to-rail competition ...is incompatible with STB/ICC precedent and fundamental principles of administrative law[7]". The AAR simply rejects that the STB has the authority to adopt rules that seek to 'enhance' competition citing the Staggers Act[8]. The principle of market-based regulation of Staggers era never envisioned that 40+ Class I's would merge in less than twenty years to only 4 major Class I's today. Instead, the Staggers Act clearly envisioned that competition between the 40+ Class I's would provide balance in the market place and establish a competitive railroad system. Such competitive balance cannot be achieved with only two railroads. On that point there is no debate. It is clear that the railroads want to re-write the NPR and eliminate the 'enhanced competition' provision. The heart of the STB order in this proceeding is to develop in this proceeding clear 'paradigm' shift away from merger oversight as it exists today and towards modern merger oversight to deal with a potential two-railroad system. This country is at the doorstep of the 'end game.' The next round of mergers will set up the two-railroad system in U.S. and possibly in North America. Virtually all of the rail customers bearing the economic brunt of diminished rail-to-rail competition support true "enhancement of competition" among railroads. The ICCTA 49 USC 10101, Railroad Transportation policy clearly states: "In regulating the railroad industry, it is the policy of the United States Government - (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."

Competition will be the only means for achieving true efficiencies that will be the lifeblood of the rail industry in the future. The Wheat, Barley & Grains Commissions continue with the belief that top line growth in railroad revenues will only occur when rail customers' needs are being more effectively met. These needs will only be effectively met when railroads have to compete for the right to serve the American shipping public.

The Wheat, Barley & Grains Commissions need a strong, vibrant railroad system in order to compete in the world markets. Increasing (enhancing) competition within the railroad industry is mandatory to curb the abuses to the ever-increasing captive rail customer base that has been turning to Congress for action to deal with the non-competitiveness existing in the railroad industry.

ACCOUNTABILITY

The railroads have, in this proceeding, taken the view that they must not be held accountable for not living up to promises they make to achieve regulatory approval of a proposed merger[9,10,11]. NS, in their reply statement, indicates the "brunt of failure" will fall on the railroad and chooses to minimize the rail customer's losses as simply "adverse affects."[12] The Wheat, Barley and Grain Commissions urge the STB to reject this 'no-responsibility for failure' approach exposed by the railroads.

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[7] Reply Comments of CP, dated December 18, 2000, at 8

[8] Reply Comments of AAR, dated December 18, 2000, at 7

[9] Reply Comments of BNSF, dated December 18, 2000, at 33

[10] Reply Comments of KCS, dated December 18, 2000, at 4

[11] Reply Comments of NS, dated December 18, 2000, at 31. NS states, "...the good faith estimates of public benefits contained in merger applications <u>are not intended and should not be viewed</u> as guarantees of a merged company's future...performance." Underlined added.

[12] Reply Comments of NS, dated December 18, 2000, at 31

The railroads have, in this proceeding, taken the view that everyone else - the economy, the Department of Defense, the rail customers, the weather, national emergencies, the grain harvests, the stock market - anything outside their control should be held responsible for any failures of a particular rail merger and that success in mergers can only come about if they are not held accountable for the promises they make to get the merger approved[13].

UPSTREAM AND DOWNSTREAM EFFECTS

The railroads have, in this proceeding, taken the view that the STB does not have the authority to look at upstream effects of past mergers[14]. There was not unanimity among the railroads as the KCS, found it liked the idea Vice Chairman Burkes put forth in his comments regarding upstream effects. KCS stated it would further consensus principles "to review service and other restrictions contained in the conditions attached to prior rail mergers[15]." Evaluation of upstream effects will allow the merger process to examine what has not worked in past mergers as well what has worked in previous mergers. Enhancement of competition requires a complete look at competitive balances, both previous and in the future. Rail customers, such as BASF, and their representatives, such as NITL, support KCS's position on this issue.

The railroads also have taken the view that the STB doesn't have the authority to look at downstream effects of future mergers[16]. Thus taken as a whole, the railroads are projecting the view that the Board shouldn't look at upstream effects and doesn't have the authority to look at downstream effects. The railroads would have this Board put on blinders while evaluating the last of the rail-to-rail mergers. As the Board has previously indicated a belief that it holds broad authorities under the merger provisions of the statute, the Commissions hope the Board will reject arguments that would eliminate the consideration of upstream and downstream effects of previous and future mergers.

UNANIMITY AMOUNG RAIL CUSTOMERS

The railroads have taken the view that because the rail customers offered diverse views on issues important to them, their views reflect lack of general agreement[17]. In fact, there is general unanimity among all rail customers that enhancement of competition is absolutely necessary[18,19,20,21,22]. Certainly, the size and diversity of the rail customer community results in a multitude of ideas for how to achieve competition among railroads, but that shouldn't be confused as a lack of consensus. The Commissions urge the Board to make full use of the many good ideas offered by the rail customer community.

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[13] Reply Comments of BNSF, dated December 18, 2000, at 30
[14] Reply Comments of BNSF, dated December 18, 2000, at 35
[15] Reply Comments of KCS, dated December 18, 2000, at 16
[16] Reply Comments of BNSF, dated December 18, 2000, at 7, 35
[17] Reply Comments of KCS, dated December 18, 2000, at 4
[18] Reply Comments of NITL, dated December 18, 2000, at 10
[19] Reply Comments of Subscribing Coal Shippers, dated December 18, 2000, at 8
[20] Reply Comments of EEI, dated December 18, 2000, at 11
[21] Reply Comments of DuPont, dated December 18, 2000, at 3
[22] Reply Comments of IMC, dated December 18, 2000, at 2

RATE STUDIES QUOTED ARE MISLEADING

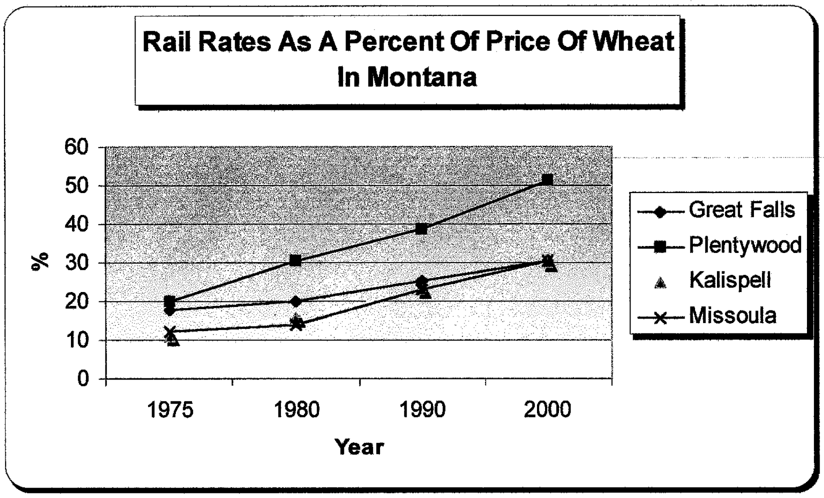
The railroads[23] point to the recent released STB rate study and conclude that competition has not been undermined by this [UP/SP] and other recent mergers in the West. The interesting observation left out of the BNSF comments is the rate study referred to by them shows conclusively that increased competition in the Power River Basin (PRB) for coal has led to lower rates, better service, increased investment in infrastructure and resultant increased margins on coal traffic. The PRB is an area where there is head-to-head competition was permitted to emerge by the ICC, and is not representative of the large areas of the West that have no competition which came about because the ICC did not preserve competition in past mergers in the West. The BNSF states, at the top of page 23 of the Reply Statement, "Rate decreases of this magnitude could not have been realized if the UP/SP and BNSF mergers had substantially decreased rail competition in the industry." The ICC allowed the CNW (later acquired by the UP) into the PRB in 1984. The UP/SP and BNSF merger, which occurred in the late-1990's did not increase competition in the PRB at that time. In fact, no competitive balance was altered in the PRB by the UP/SP and BNSF mergers. Another failure of the cited study is the 'failure' to measure properly the shift in certain logistics' costs from railroads to their customers. Increasing transport costs borne by the rail customers include a rail customer's investment in loading and unloading facilities, rail cars and equipment and in grain elevating facilities, and the hauling further and further to ever more-distant elevators.

The suggestion that western rail rates fell during the 1996-1999 period[24] of western consolidations is not factual in wheat growing areas of the West. While one can argue the amount of increase versus inflation, the captive rail wheat customers have seen an alarming trend when comparing the price of rail transportation to the price of wheat in the most captive rail customer's areas. The graph below shows that the price of rail transportation has soared from 15-20% of the price of wheat in 1975, to over 30-50% in 2000 throughout Montana. The states of Colorado, Idaho, Nebraska, Oregon, South Dakota and Washington have similar experiences. All of these areas have borne the brunt of decreased competition due to a merger policy that 'preserved' but did nothing to enhance competition over the last 20 years. When a farmer is selling a bushel of wheat grown on their farm, they are paying more for rail transportation than they ever have in history.

To suggest rail rates or service improvement has fallen because of increased or 'non-decreased' competition in the Western United States suggests serious lack of understanding of vast portions of the West that have been reduced from two, three and even four transcontinental carriers to a single carrier in the last twenty years.

[23] Reply Comments of BNSF, dated December 18, 2000, at 22

[24] Reply Comments of BNSF, dated December 18, 2000, at 22



The Staggers Act never envisioned whole states, indeed whole industries over several states would become captive to a single railroad. Staggers envisioned a multi-railroad landscape where rail customers would have access to multiple intramodal competitors to fill their needs.

The STB study referred to by BNSF is in conflict with the finding last year by the General Accounting Office (GAO) in their report RCED-99-46 issued in February 1999, on competitive access issues:

- 75% of shippers surveyed believe they are being overcharged with unreasonable rates
- 70% of shippers believe that the time, complexity and cost of filing complaints are barriers to regulatory relief from those unreasonable rates

The study also concluded that while rail rates had generally decreased since 1990, the decrease had not been across the spectrum of rail customers. For chemicals, coal and grain there is evidence of higher rates. Unfortunately, the study did not attempt to measure changes in the cost of rail transportation, which might also have begun to determine whether there has, in fact, been a significant deterioration in the ratio of value (service quality) to price. Large quantities of anecdotal evidence, however, would suggest that far too many rail customers are paying more and more, and getting less and less.

The Wheat, Barley & Grains Commissions continue to urge this Board to seek out opportunities to enhance competition among railroads and to work towards achieving a better balance between the railroads and the public interest in these proposed rules. The Board should adopt merger policies that in all future rail mergers, all rail customers should have the right to rail-to-rail competition as a matter of national rail policy, and for those rail customers that do not have rail-to-rail competition, this Board should adopt a more accessible and responsive regulatory relief system.

The Wheat, Barley & Grains Commissions thank the Board for this opportunity to participate in this proceeding.

Submitted by:

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01/10/2001
Date:

For:
~~MONTANA WHEAT & BARLEY COMMITTEE~~
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
OREGON GRAINS COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that the above described Comments of the Wheat, Barley & Grains Commissions has been duly served on all Party of Record identified on service list via first class mail in the United States Postal Service this 11th day of January, 2001, in the USPS station in Billings, Montana 59101.

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